No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

—v.—

TODD MITCHELL,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights.

Since its founding in 1920, the ACLU has been a zealous advocate of the First Amendment and has steadfastly opposed government efforts to regulate either free speech or thought, no matter how well-intentioned those efforts might be. This commitment to free speech has led the ACLU to defend numerous clients whose political ideologies are abhorrent to most members of the organization. We have done so, nonetheless, because of our belief that civil liberties are indivisible, and that free speech rights cannot be granted to some and denied to others. Largely for these reasons, the ACLU filed an *amicus curiae* brief last Term in *R.A.V. v. City of St. Paul*, __ U.S. __, 112 S.Ct. 2538 (1992), arguing that the challenged ordinance was fatally overbroad and thus threatened important free speech values.

The ACLU's commitment to free speech has always stood side-by-side with its commitment to equal protection of the laws. Thus, throughout its seventy-year history, the ACLU has consistently argued in favor of anti-discrimination laws and has frequently supported the constitutionality of such laws in cases before this Court. *See, e.g., New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1987).

The issue in this case has been framed by some as a choice between preventing discrimination or preserving free speech. We believe this misstates the issue, as set forth more fully below, and that the Wisconsin statute can be upheld in a manner that is consistent with First

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

Amendment principles. Clearly, however, this case touches on matters of fundamental importance to the ACLU. We therefore submit this brief as *amicus curiae* to offer the Court the benefit of our views.

STATEMENT OF THE CASE

On October 7, 1989, respondent Mitchell was one of several blacks gathered outside an apartment complex in Kenosha, Wisconsin. Prior to moving outside, some members of the group had been discussing a scene portraying the racist beating of a young black child in the movie "Mississippi Burning." Upon joining the discussion, Mitchell turned to the others, most of whom were younger, and said: "Do you all feel hyped up to move on some white people?"

Shortly after this comment, Mitchell spotted a white teenager named Gregory Reddick walking down the other side of the street. Mitchell turned again to the group and said: "There goes a white boy; go get him." Mitchell then counted to three. In response, the group (which at that point numbered around ten) ran towards Reddick, beat him without provocation, and stole his sneakers. As a result of the beating, Reddick was in a coma for four days. He suffered extensive injuries and may have suffered permanent brain damage.[2]

Following a jury trial, Mitchell was convicted of aggravated battery. In addition, the jury found that Mitchell had intentionally selected Reddick as his victim because of Reddick's race. This separate finding triggered Wisconsin's penalty enhancement statute, which provides for increased punishment when the defendant,

[2] This statement of facts is taken from the majority opinion of the Wisconsin Supreme Court. *State v. Mitchell*, 485 N.W.2d 807, 809 (1992).

> intentionally selects the person against whom the crime . . . is committed or selects the property which is damaged or otherwise affected by the crime . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

Wis.Stat. §939.645.[3] Thus, rather than the two years imprisonment he would otherwise have faced for aggravated battery, Mitchell was sentenced to four years in prison.[4]

On appeal, the Wisconsin Supreme Court declared its state's penalty enhancement statute unconstitutional. Describing the law as a "hate crime" statute, 485 N.W.2d at 810, a majority of the Wisconsin Supreme Court concluded that the law impermissibly punished respondent for his thoughts, rather than his deeds, in violation of the First Amendment. In reaching this conclusion, the majority relied, in part, on this Court's decision in *R.A.V. v. City of St. Paul*, 112 S.Ct 2538. There were two dissents. Both found *R.A.V.* distinguishable, both found the state's interest in eliminating discrimination compelling, and both found that the Wisconsin statute properly focused on respondent's unlawful conduct.

[3] The statute has recently been amended in ways that are not material to the issue before this Court.

[4] Under Wisconsin's penalty enhancement statute, the trial judge could have increased Mitchell's penalty for aggravated battery by as much as five years. Mitchell was also convicted of theft. On that charge, he received a four year prison sentence, which was stayed, and a four year period of consecutive probation. Mitchell's sentence for theft, unlike his sentence for aggravated battery, was not enhanced by the trial court. 485 N.W.2d at 809 n.3.

SUMMARY OF ARGUMENT

The constitutionality of so-called hate crime statutes has engendered enormous debate around the country in recent years.[5] That debate is an important one and ultimately must be resolved by this Court. However, the existence of that debate should not obscure the substantial consensus that unites all the parties to this controversy. Even those who oppose the Wisconsin statute would agree that bigotry can lead to violence, and that violence prompted by bigotry is a serious social problem that must be addressed. Conversely, even those who support Wisconsin's law must acknowledge that the First Amendment bars the state from punishing individuals for their bigoted thoughts.

Seen in this light, the current dispute has less to do with principles than perspective. If we agreed with the Wisconsin Supreme Court that Mitchell has been punished for his thoughts, we would also agree that the Wisconsin statute that authorized his punishment must be struck down. But, because we disagree with the premise of the Wisconsin Supreme Court, we also disagree with its conclusion.

Mitchell was not punished for his beliefs, he was punished for *acting* on those beliefs. This distinction is central to every antidiscrimination law. For example, a landlord need not believe in racial equality but he may not act on those beliefs by refusing to rent to tenants on the basis of race without violating federal law.

According to the Wisconsin Supreme Court, the difference between this statute and other antidiscrimination

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[5] For example, on successive days this summer, Ohio's hate crime statute was upheld by its state's highest court, *State v. Wyant*, 597 N.E. 2d 450 (Ohio Sup.Ct. 1992), while Oregon's hate crime statute was struck down by its state's highest court, *State v. Plowman*, 838 P.2d 558 (Ore.Sup.Ct. 1992).

laws is that this statute focuses on motive rather than intent. There are several fallacies with that reasoning. First, the meaning of these terms is hardly self-evident. Why is Mitchell's choice of Reddick as a victim a question of motive, while a landlord's choice of tenants on the basis of race is a question of intent? Second, it is simply not true that the law never takes a defendant's reasons into account when imposing sentence. To the contrary, it is quite common for judges to consider a defendant's motives during the sentencing process. The decision below never explains why the legislature should be disabled from considering sentencing factors that judges routinely take into account.

The Wisconsin Supreme Court also erred in its reliance on *R.A.V.* The local ordinance struck down in that case was aimed directly at speech. By contrast, a penalty enhancement statute never comes into play until the defendant has been convicted for an underlying, substantive crime. In *R.A.V.*, the defendant was charged with engaging in an act of symbolic expression; here, Mitchell was arrested for participating in a vicious act of physical brutality. The two situations are simply not analogous.

To be sure, a penalty enhancement statute means that similar criminal acts may be treated differently depending on whether the victim was chosen based on some immutable characteristic. There is no more reason to question those lines in this context, however, than in any other antidiscrimination context. Indeed, there are powerful reasons -- both moral and practical -- why society should be especially concerned about acts of violence based on a victim's group status. These distinctions, unlike the ordinance in *R.A.V.*, have nothing to do with society's desire to suppress unpopular ideas or limit public debate.

Unfortunately, there is always the risk that hate crime statutes will be misused, and that their misuse will have a significant chilling effect on First Amendment

rights. Thus, while we believe the decision below should be reversed, we also believe the Court should use this opportunity to set forth a clear set of rules governing the use of such statutes in the future. First and foremost, the existence of a penalty enhancement statute does not entitle the state to conduct a limitless probe into a defendant's political views. Thus, a defendant's words are only relevant if the government proves that they are directly related to the underlying crime and probative of the defendant's discriminatory intent. Without this clear nexus, the defendant's thoughts and expressions remain constitutionally protected and inadmissible. Moreover, the requisite discriminatory intent must be proven beyond a reasonable doubt. This standard cannot be met in ordinary circumstances merely by showing that the defendant uttered a racial epithet during the commission of a crime. Finally, trial courts must be vigilant to ensure that penalty enhancement statutes do not themselves become a vehicle for discrimination against minority groups.

ARGUMENT

I. THE DECISION TO IMPOSE ADDITIONAL PUNISHMENT FOR BIAS CRIMES REFLECTS SUBSTANTIAL STATE INTERESTS THAT CAN BE ACKNOWLEDGED WITHOUT VIOLATING THE FIRST AMENDMENT

The decision below rests on the premise that Wisconsin's hate crime statute was invoked in this case to punish Mitchell for his thoughts in violation of the First Amendment. Simultaneously, however, the majority opinion concedes the constitutionality of numerous civil rights laws on the federal, state, and local level that prohibit discrimination of various sorts. This inconsistency is central to understanding the decision below, and fatal to its reasoning.

Seizing on this paradox, Justice Bablitch posed a series of questions in his dissenting opinion that put the issues in this case into sharp focus:

> How can the Constitution not protect discrimination in the selection of a victim for discriminatory hiring, firing, or promotional practices, and at the same time protect discrimination in the selection of a victim for criminal activity? How can the Constitution protect discrimination in the performance of an illegal act and not protect discrimination in the performance of an otherwise legal act? How can the Constitution not protect discrimination in the marketplace when the action is taken "because of" the victim's status, and at the same time protect discrimination in a street or back alley when the criminal action is taken "because of" the victim's status?

485 N.W.2d at 820.

There is no satisfactory answer to these questions, or at least none that is offered by the Wisconsin Supreme Court. Specifically, its reliance on the purported distinction between motive and intent does not withstand scrutiny. If anything, the decision below demonstrates that these terms are so easily subject to manipulation that they simply cannot form the basis for resolving the important social, political, and legal issues at stake in this case. Similarly, the reliance by the majority below on this Court's decision in *R.A.V.* is misplaced. Like the discussion of motive and intent, it ignores the fundamental difference between speech and action that has always been pivotal in First Amendment law. Finally, the decision below undervalues the state interest in treating bias crimes more severely, not because of the ideas they reflect but because of the unique damage they cause, both to the individuals affected and to the heterogeneous so-

ciety in which we all live.

A. Respondent Was Not Punished For His Thoughts

Contrary to the view of the majority below, respondent is not facing an additional two years in prison because the State of Wisconsin disapproved of his attitude toward whites. *Cf. Street v. New York*, 394 U.S. 576 (1969)(overturning flagburning conviction because of risk that defendant was punished for condemning the flag rather than burning it). Respondent is facing an additional two years in prison because he deliberately chose the victim of his assault on the basis of race. Until he engaged in this discriminatory behavior, respondent was free to think and say whatever he wished. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989). Once he engaged in this discriminatory behavior, respondent crossed a crucial constitutional line.[6]

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[6] We do not mean to suggest that the same reasoning could be used to sustain *any* hate crime statute. In this sensitive area, language matters. For example, Florida law provides for an enhanced penalty if the commission of a crime "evidences prejudice based on the race, color, ancestry, ethnicity, religion, or national origin of the victim." Fla.Stat. §775.085. There are several constitutional problems with this statutory approach. First, the Constitution does not permit the government to punish "prejudice," which is what the Florida statute purports to do on its face. As this Court made clear in *Texas v. Johnson*, 491 U.S. at 414:

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

See also Stanley v. Georgia, 394 U.S. 557, 566 (1969)(legislation may not be premised "on the desirability of controlling a person's private thoughts"). Second, it is impossible to know with any precision what is meant by the phrase, "evidences prejudice." This vagueness, at the very core of the statute, creates a constitutionally intolerable risk of discriminatory enforcement based on the popularity of a person's

(continued...)

It is true, of course, that Wisconsin's hate crime statute only applies if the victim was "intentionally select-[ed]" on the basis of race (or other immutable characteristic). It is also true that this finding requires some inquiry into the thought processes of the defendant at the time the crime is committed. It is not true that this inquiry automatically violates the First Amendment, or that it is nearly as unusual as the decision below suggests.

To the contrary, numerous discrimination cases turn on the claim that the victim of discrimination was targeted for disadvantageous treatment because of some characteristic that the law deems irrelevant. Such claims of "disparate treatment" can and do arise in many different contexts, civil and criminal. For example, an employer who discriminates on the basis of race is subject to civil remedies under Title VII, 42 U.S.C. §2000e-2.[7] A landlord who discriminates on the basis of race is subject to criminal prosecution under the Fair Housing Act. 42 U.S.C. §3631.[8] Under both Title VII and the Fair Hous-

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[6] (...continued)
ideas. *See Smith v. Goguen*, 415 U.S. 566, 573 (1974)(vagueness doctrine applies with special force in a First Amendment context). For these reasons, the ACLU of Florida has filed an *amicus curiae* brief with the Florida Supreme Court asking it to declare Florida's hate crime statute unconstitutional. *See State v. Stalder* and *State v. Leatherman*, Case Nos. 79,924 & 80,126 (consolidated July 23, 1992).

[7] *See Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)("proof of discriminatory motive is critical" in "disparate treatment" cases under Title VII). Equal protection claims under the Fourteenth Amendment also require a showing of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229 (1976). Under 42 U.S.C. §1981, which protects the right to make contracts and hold property free of discrimination, the availability of punitive damages depends on a showing of "evil motive or intent." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

[8] *See also* 18 U.S.C. §242 (making it a federal crime for anyone acting

(continued...)

ing Act, the proof of discrimination often includes statements by the defendant that help to explain conduct that might otherwise be subject to differing interpretations. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1990). Yet, no one has ever successfully argued that either statute is inconsistent with the First Amendment simply because it prohibits intentional discrimination. *Cf. Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

Nor is the Wisconsin Supreme Court prepared to take on that battle. Rather, the majority below attempts to differentiate Wisconsin's hate crime statute from other antidiscrimination laws by asserting that traditional antidiscrimination laws punish an "objective act" while the hate crime statute punishes a "subjective mental process." 485 N.W.2d at 817. What the decision below does not fully explain is why this is so.

To the extent that one can infer the lower court's rationale, it appears to be that there is no prohibited conduct in the traditional disparate treatment cases unless the defendant has acted for discriminatory reasons. Thus, the defendant's discriminatory reasons are inseparable from the "objective act" of discrimination that justifies the state's intervention. By contrast, the state has an interest in punishing assault regardless of the defendant's

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[8] (...continued)
under color of law to deprive another person of rights secured by the Constitution "by reason of" the victim's color or race). More than a half-century ago, this Court explained the rationale for such laws:

> The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties is emphasized by events familiar to all. These and other transgressions of those limits the state may appropriately punish.

Cantwell v. Connecticut, 310 U.S. 296, 310 (1940).

reasons. Accordingly, increasing the penalty because the defendant has acted for discriminatory reasons punishes the defendant for his thoughts.

The problems with this formulation are apparent. Selecting an assault victim on the basis of race *is* an "objective act" of discrimination. The fact that this "objective act" may be proven by reference to the defendant's words is no different than any other antidiscrimination law. The fact that assaults are otherwise prohibited should increase the state's concern with discrimination rather than diminish it. And the fact that Wisconsin has chosen to enact a penalty enhancement statute rather than create a new substantive crime of discriminatory assault is a convenience of drafting and not, as the Wisconsin Supreme Court apparently believes, a fatal constitutional flaw.

Recasting the argument in terms of motive and intent neither illuminates nor redeems the decision below.[9] Indeed, it is not at all clear that Wisconsin's hate crime statute even punishes motive, if motive refers to the reason "why" a person acts in a certain fashion. 485

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[9] The Wisconsin Supreme Court's discussion of motive and intent borrows heavily from an influential law review article on the subject. *See* Gellman, "Sticks And Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional And Policy Dilemmas Of Ethnic Intimidation Laws," 39 U.C.L.A. L.Rev. 333 (1991). Summarizing her argument, Gellman states:

> Discrimination and bigotry are not the same thing: the former is an illegal act, the latter is a constitutionally protected (albeit odious) attitude. Just as bigotry can exist without being acted upon, discrimination can occur without racist motivation. It is the discriminatory action, and not the racial motive that Congress intended to prohibit in [the federal antidiscrimination] statutes.

Id. at 368-69. We agree. However, we also believe the Wisconsin hate crime statute can be upheld on precisely the same grounds.

N.W.2d at 813 n.11.[10] There are numerous explanations for why respondent may have selected Reddick as an assault victim. One, certainly, is a genuine racist feeling. Another equally plausible explanation, however, is that Mitchell, like many adolescents, was simply trying to impress his friends. It is even possible that Mitchell was primarily interested in stealing Reddick's sneakers and used racial rhetoric only because he thought it was most likely to spur the others on. In short, the reasons why Mitchell acted remain a mystery on this record. All the prosecution showed, and all the prosecution was required to show under Wisconsin's hate crime statute, was that Mitchell acted on the basis of race.[11]

Whether this showing is characterized as the "why" or the "what" of respondent's behavior is not a fixed and determinate judgment. Rather, it is a judgment that is almost entirely contingent on how one views the state's interest in this case. If the state's interest is limited to punishing assaults, then the decision to target Reddick because of his race only explains "why" Mitchell acted in the manner he did. On the other hand, if the state has a legitimate interest in treating bias attacks as a separate and independent offense, then the decision to target Reddick because of his race is part of "what" made Mitchell's conduct unlawful. Thus, the distinction between motive and intent does not advance the discussion; at most, it merely rephrases the question.

[10] In the course of its opinion, the majority below expressed the view that the reference to intent in Wisconsin's hate crime statute was only a subterfuge for the legislature's real preoccupation with motive. This is, at best, a political observation and not the sort of authoritative construction of state law that is entitled to deference by this Court. *Cf. Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[11] For this reason, the term "hate crime" statute is actually a misnomer. It is nevertheless used throughout this brief for the sake of convenience since it is the term employed by the Wisconsin Supreme Court.

Even if the distinction between motive and intent were clearer than it appears in this and many other cases, the majority below plainly overstated the law by suggesting that motive can never be part of the sentencing process. Sentencing decisions frequently take motive into account. On the most extreme level, the difference between capital punishment and life imprisonment in many states may depend, *inter alia*, on whether the murder was committed for financial gain. *See, e.g., Lewis v. Jeffers*, 497 U.S. 764, 768 n.1 (1990). And, surely nothing in the Constitution forbids a sentencing judge from distinguishing between a defendant who steals to care for his ailing parents and a defendant who steals out of personal greed.

This very issue was before the Court in *Dawson v. Delaware*, __ U.S. __, 112 S.Ct. 1093 (1992). The defendant in that case had been sentenced to death based, in part, on evidence that he had been a prison member of the Aryan Brotherhood, a white supremacist organization. The Court ruled that the admission of this evidence violated the First Amendment because there had been no showing that Dawson's membership in the Aryan Brotherhood had any relationship to the murder he committed while an escapee. *Id.* at 1098.[12] At the same time, however, the Court was unwilling to accept the "broad" contention that a defendant's sentence may never be affected by beliefs or activities that would be protected by the First Amendment, and thus immune from punishment, in other contexts. *Id.* at 1097.[13] As the

[12] The ACLU took the same position in its *amicus* brief.

[13] Under the circumstances of this case, it is far from certain that Mitchell's statements would be protected under traditional First Amendment doctrine. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (First Amendment does not protect speech intended and likely to lead to imminent lawless action).

Court noted, such evidence has traditionally been admissible for sentencing purposes when it bears a direct relationship to the crime charged. *E.g., Barclay v. Florida*, 463 U.S. 939, 949 (1983)(racial "elements" of crime may be considered during sentencing).

The Wisconsin Supreme Court rejected this nuanced approach in favor of a *per se* rule that has no support in this Court's precedents. In response to the dissent's citation to *Dawson*, the majority below insisted that there is a constitutionally significant difference between relying on motive to determine the defendant's initial sentence and relying on motive to determine the applicability of a penalty enhancement statute. 485 N.W.2d at 815 n.17. It may well be true that the sentencing process involves one step in the first instance and two steps in the latter. But beyond stating this difference, the majority below offers no explanation of why it should matter.[14]

Only a few weeks ago, this Court ruled that abortion clinics could not prevail in a suit against Operation Rescue under 42 U.S.C. §1985 without establishing the existence of class-based animus. *Bray v. Alexandria Women's Clinic*, 61 U.S.L.W. 4080 (Jan. 13, 1992). The Court further held that the requirement of class-based animus demands "at least a purpose that focuses upon women *by reason of their sex*" or "*because they are women*." *Id.* at 4081-82 (emphasis in original). For all practical purposes, this is precisely the same showing that Wisconsin demands as a predicate for invoking its penalty enhancement statute. What is constitutional in one context is no less constitutional in the other.

[14] If anything, the necessity of proving discriminatory intent beyond a reasonable doubt in a hate crime prosecution governed by the rules of evidence provides a defendant with greater protection than the traditional sentencing schemes.

B. *R.A.V.* Is Not Controlling

In *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, this Court reviewed a local ordinance that made it illegal to knowingly engage in symbolic speech, including the burning of a cross, that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." Five members of the Court concluded that the ordinance represented an impermissible regulation of speech on the basis of content, even when limited to "fighting words." Four members of the Court found that the law was unconstitutionally overbroad because it reached protected speech. Of critical importance, however, all nine members of the Court in *R.A.V.* agreed that the law was directly aimed at expression.

This case involves very different concerns. As noted above, Wisconsin's hate crime statute is not aimed at expression, it is aimed at the discriminatory act of selecting a criminal victim on the basis of race or other group characteristic. Similarly, the Wisconsin statute is not triggered by a finding of "anger, alarm or resentment," with all the problems that finding presents in a First Amendment context. Instead, the Wisconsin statute can only be invoked if it is shown that the defendant violated an underlying (and racially neutral) provision of the criminal law in a deliberately, discriminatory fashion.

By focusing on discrimination rather than speech, the Wisconsin statute avoids the constitutional problems that plagued the St. Paul ordinance struck down in *R.A.V.* Specifically, the Wisconsin statute does not punish "speakers who express views on disfavored subjects," 112 S.Ct. at 2547, nor does is it designed to "drive certain ideas or viewpoints from the marketplace," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. __, 112 S.Ct. 501, 508 (1991). Bigotry is an idea, discrimination is an act. The First Amendment protects the former, it does not and should not protect the latter. As the Court stated in *Norwood v. Harrison*,

413 U.S. 455, 469 (1973), "the Constitution . . . places no value on discrimination."

Nothing in *R.A.V.* diminishes the force of the well-established distinction between discriminatory beliefs and discriminatory behavior. To the contrary, this distinction is crucial to understanding the decision in *R.A.V.* Thus, Justice Scalia's majority opinion went out of its way to reaffirm the validity of Title VII and other antidiscrimination laws. 112 S.Ct. at 2546. The Court did so, moreover, despite its recognition that discrimination is often proven by speech and, in some circumstances, may depend almost entirely on speech. *Id.* at 2545-47.[15] Nevertheless, Justice Scalia carefully explained, "[w]here the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *Id.* at 2546-47. A necessary corollary of that proposition is that antidiscrimination laws do not "target" expression even if they rely on expression to prove discrimination. If that is true in Title VII, it is equally true here.[16]

The Wisconsin Supreme Court's reliance on *R.A.V.*

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[15] *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)(Title VII bars the creation of a "hostile working environment" that inhibits equal employment opportunities). *See generally Cox v. Louisiana*, 379 U.S. 559, 563 (1965)("It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed").

[16] Under prevailing doctrine, this Court has shown greater deference to laws that are not aimed at "the suppression of free expression," even if they have an incidental impact on speech. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Applying *O'Brien*, Wisconsin's hate crime statute can be upheld if it advances a substantial state interest. In fact, it does more. As this Court has frequently noted, the elimination of discrimination is a "compelling state interest[] of the highest order." *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984).

is also undermined by Justice Scalia's discussion of 18 U.S.C. §871, which makes it a federal crime to threaten the life of the President, although most threats are not otherwise covered by federal law. Because of this disparity in treatment, the decision to intentionally target the President has sentencing implications that are not substantially different than the increased punishment facing a defendant in Wisconsin who intentionally selects a victim on the basis of race. Yet, the *R.A.V.* majority perceived no significant First Amendment difficulty with 18 U.S.C. §871 as long as the government does not "criminalize only those threats against the President that mention his policy on aid to inner cities." 112 S.Ct. at 2546.

Judged by this same standard, the decision below is clearly erroneous. Under Wisconsin's hate crime statute, it does not matter whether the defendant was acting on the basis of genuine prejudice or misguided bravado. *See* p.12, *supra*. Thus, in analyzing this statute, as in analyzing 18 U.S.C. §871, the critical issue is not whether the defendant's sentence can be affected by the status of the victim he has selected, but whether the lines the state is drawing reflect substantial interests unrelated to the suppression of ideas. *See* n.16, *supra*. As explained more fully below, we believe they do in this case.

C. The State Has An Overriding Interest In Curbing Discriminatory Acts Of Violence

The central fallacy of the decision below is its failure to recognize that bias attacks produce unique injuries -- to the victim and to society -- that fully justify Wisconsin's decision to treat them more harshly than ordinary assaults. "Conduct that creates special risks or causes special harms may be prohibited by special rules." *R.A.V.*, 112 S.Ct. at 2561 (Stevens, J., concurring). One may not believe that hate crime statutes are an effective way to deal with the special harms posed by bias attacks.

See Gellman, *supra* n.9, at 388-93. But a legislature is clearly free to conclude otherwise and to adjust the level of punishment accordingly.

The sort of bias attack that took place in this case is more than an assault on the victim's physical well-being. It is an assault on the victim's essential human worth. A person who has been singled out for victimization based on some group characteristic -- such as race, religion, or national origin -- has, by that very act, been deprived of the right to participate in the life of the community on an equal footing for reasons that have nothing to do with what the victim did but everything to do with who the victim is.[17] In short, a bias attack is as much an attack on the victim's persona as on the victim's person. Recognition of that fact inevitably produces a sense of vulnerability, isolation and oppression that rarely disappears when the physical injuries heal. *Cf. United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp. 330, 343-44 (E.D.La. 1965)(three-judge court).

By their very nature, moreover, these harms are not confined to the actual victim. Because bias crimes are triggered by the victim's membership in a larger group, the feelings of vulnerability and injustice created by bias

[17] Certain civil rights laws address this connection explicitly by requiring proof that the defendant's conduct deprived the victim of a constitutional right or other legally protected interest. *See, e.g.*, 18 U.S.C. §242. Typically, however, such statutes do not otherwise define the conduct they prohibit. The requirement of specific intent is therefore necessary to relieve significant vagueness problems. *See Screws v. United States*, 325 U.S. 91, 102 (1945). Wisconsin's hate crime statute does not suffer from the same vagueness problems because it can only be invoked after there has been an underlying criminal conviction. Moreover, it is difficult to conceive of a bias attack that would not also deprive the victim of a constitutional right or other legally protected right. Little purpose is served by requiring the government to prove a tautology. In this case, for instance, the victim plainly had a legal right to walk down the streets of his hometown without being beaten because of his race.

crimes are frequently and understandably shared by other members of the group. *Cf. NAACP v. Alabama*, 357 U.S. 449, 462-63 (1957). In a very real sense, therefore, every bias crime has multiple victims whose interests are entitled to consideration as part of the sentencing process.

Finally, a state that chooses to respond to these concerns by enhancing the penalty for hate crimes can fairly claim to be furthering many of the traditional purposes of the criminal law. As a matter of retributive justice, society can certainly decide that bias attacks are worthy of special moral condemnation because of the particular way that they dehumanize the victim. As a matter of special deterrence, society has every right to be concerned that the perpetrators of hate crimes pose a special risk of recidivism. *See* Nowak & Rotunda, CONSTITUTIONAL LAW 112 (4th ed. 1991). As a matter of general deterrence, there is surely reason to be concerned by the statistical rise in the number of hate crimes reported throughout the country. *See* Note, "Bringing Hate Crime Into Focus: The Hate Crime Statistics Act of 1990," 26 Harv.C.R.-C.L.L.Rev. 261 (1991). If nothing else, events of the past year -- from Los Angeles to Crown Heights -- tragically highlight the relationship between bias attacks and social unrest.

Simply put, there is more at stake from a bias attack than from an ordinary crime. Wisconsin's hate crime statute represents a permissible response to those increased stakes.[18]

[18] In our view, Wisconsin's hate crime statute is on its strongest constitutional footing when, as here, the underlying crime involves physical injury to the victim or damage to the victim's property. On its face, Wisconsin's law goes beyond these categories and would, for example, permit penalty enhancement for criminal defamation on the basis of race. *See* Wis.Stat. §942.01. Any such application of the law would raise serious constitutional problems. *Cf. American Booksellers Ass'n,*

(continued...)

II. ANY HATE CRIME STATUTE MUST BE CAREFULLY DRAFTED AND CAREFULLY APPLIED TO SATISFY FIRST AMENDMENT CONCERNS

Although we believe the Wisconsin hate crime statute is constitutional, both on its face and as applied, we recognize that it legislates in a constitutionally sensitive area and is easily susceptible to prosecutorial abuse. Given the proliferation of similar laws throughout the country,[19] it is essential for this Court to establish a clear set of constitutional guidelines designed to ensure that hate crime statutes do not become, as their critics predict and even their supporters fear, a vehicle for the suppression of unpopular ideas.

Most importantly, hate crime statutes must not be regarded as a general license to inquire into a defendant's beliefs, expressions, and associations. The defendant's words may sometimes prove the racial intent necessary to invoke a hate crime statute, as in this case, but those words must be specifically tied to the crime charged. Without this clear nexus, the defendant's speech should be deemed inadmissible.

In part, this conclusion flows from traditional rules of evidence. The fact that a defendant belongs to a racist organization and reads racist literature is generally

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[18] (...continued)
Inc. v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)(casting doubt on constitutionality of group libel laws). Nevertheless, we do not believe that the relatively unlikely possibility of such unconstitutional applications is sufficient to strike down the statute on overbreadth grounds. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1; *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

[19] According to the latest report of the Anti-Defamation League, approximately half the states have now enacted penalty enhancement statutes. HATE CRIME STATUTES: A 1991 STATUS REPORT.

none of the state's business. Even in the context of a hate crime prosecution, its prejudicial impact outweighs its probative value. *See* Rule 403, Federal Rules of Evidence. In part, these evidentiary rules are constitutionally compelled by the First Amendment. Absent a direct relationship between the defendant's words and deeds, there is too great a risk that hate crime prosecutions will be used by the state as a means of thought control. *See, e.g., NAACP v. Claiborne Hardware*, 458 U.S. 886, 919 (1982).

For obvious reasons, a defendant's speech is more likely to be relevant in a hate crime prosecution if it occurs at the same time as the underlying criminal activity. Conversely, the claim of relevance becomes more attenuated as the defendant's speech becomes more remote in time.[20] Knowing where to draw this line may require a difficult exercise in judgment, but it is not an unfamiliar one. For example, the Court has repeatedly held that a public employee may neither be discharged nor demoted on the basis of speech unless that speech directly affects the employee's job performance. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987).

The rule of constitutional relevance applied in the employment cases is not substantially different than the one we urge the Court to adopt here. "Th[e] judgment should be made in any particular case from a functional point of view with regard to the essential requirements of an uninhibited system of freedom of expression." Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 406 (1966). Furthermore, the concern over chilling effect is precisely the same. If the government is not able to

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[20] At a minimum, any speech or association that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views is not sufficient to meet this test.

prove that an employee's speech is linked to job performance, the chances increase that the employer's punitive action is politically motivated. Likewise, if the state is not able to prove that a defendant's speech is linked to specific criminal behavior, the chances increase that the state's hate crime prosecution is politically inspired.

To minimize this risk, the defendant's discriminatory intent in any hate crime prosecution must be proven beyond a reasonable doubt (since it is most appropriately conceived as an element of the offense.) *See Noto v. United States*, 367 U.S. 290, 299 (1961)(First Amendment requires that intent be established "according to the strictest law"). Properly applied, this standard cannot be met in ordinary circumstances merely by showing that the defendant uttered a racial epithet during the commission of a crime. Two men engaged in a fight may hurl racial epithets at each other; that does not mean that either one started the fight for racial reasons. Racial epithets may be relevant to proving racial prejudice but racial prejudice, without more, cannot be the basis of a hate crime prosecution.[21]

Finally, courts must be vigilant to ensure that hate crime statutes do not themselves become a vehicle for discrimination against minority groups. As one commentator has noted with regard to hate speech statutes, which raise different but related concerns, "it may actually be angry members of underprivileged groups that end up being prosecuted most often" under such laws. Greenawalt, SPEECH, CRIME, AND THE USES OF LANGUAGE

[21] The dangers inherent in obscuring this line are illustrated by the decision of Florida authorities to prosecute a black man who referred to a police officer as a "white cracker" on the theory that this statement "evidence[d] prejudice" under the state's hate crime statute. *See* n.6, *supra*. The charges were ultimately dropped for insufficient evidence. *See* Gellman, *supra* n.9, at 361 n.134.

301 (1989).[22] The experience in other countries reinforces this concern. *See* Barendt, FREEDOM OF SPEECH 163 (1985)(reporting that British Race Relations Act has "often been used to convict militant black spokesmen"). Obviously, this Court must deal with the case before it. But, in dealing with the case before it, this Court can and should make an unambiguous statement that any such pattern of discriminatory enforcement will not be tolerated.

[22] *See also* Gellman, *supra* n.9, at 387.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

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